SMARTFRAME SDN BHD

v.

ANJUNG BAHASA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
MAH WENG KWAI JC
[COMPANIES (WINDING-UP) NO: D-28NCC-174-2010]
9 FEBRUARY 2011

COMPANY LAW: *Winding up - Insolvency - Whether company commercially solvent - Failure by company to comply with notice under s. 218 Companies Act 1965 - Rebuttable presumption of insolvency - Onus on company to rebut presumption - Whether sufficient evidence produced to rebut presumption*

COMPANY LAW: *Winding up - Petition - Abuse of process - Whether filing of petition despite original judgment being disputed amounts to abuse of process - Whether erroneous calculation of interest rendered s. 218 notice and petition defective - Whether petition filed for collateral purpose to exert pressure on company*

COMPANY LAW: *Winding up - Petition - Whether company unable to pay debts - Enforcement of final judgment against company - Whether validity of judgment could be challenged in winding-up court - Whether company had a valid cross-claim - Whether filing of petition amounted to abuse of process - Companies Act 1965, s. 218*

The petitioner had obtained a judgment against the respondent for the principal sum of RM1,538,239.26. As the respondent failed to pay the judgment sum, the petitioner on 5 February 2010 served a notice pursuant to s. 218(2)(a) of the Companies Act 1965 ("the Act") on the respondent. Since the respondent did not pay the sum demanded within 21 days, the respondent was deemed *prima facie* insolvent and unable to pay its debt. On 10 March 2010 the petitioner filed the winding-up petition to wind-up the respondent ("the petition") pursuant to the s. 218 notice. Prior to that, the petitioner had on 10 March 2006 and 31 October 2007 filed two winding-up petitions against the respondent. Both these petitions were respectively struck off and dismissed. As a result, the respondent had filed a claim against the petitioner for damages for malicious prosecution and abuse of process. The respondent contended that this claim was a genuine cross-claim against the petition. The plaintiff's judgment obtained against the

A respondent was based on a corporate guarantee given by the respondent in respect of a contract undertaken by Visage Engineering Sdn Bhd ("Visage"). The petitioner had commenced arbitration proceedings and had obtained an award against Visage. Visage applied to set aside the award in the High Court but was B unsuccessful, following which Visage appealed to the Court of Appeal. The appeal was pending. The respondent objected to the petition claiming that: (i) the filing of the petition in the face of the respondent's strenuous opposition to the two earlier petitions amounted to an abuse of process; (ii) the respondent had given C notice of objection on the validity of the s. 218 notice; (iii) the respondent's cross-claim was genuine and therefore ought to be heard and determined by the court before the petition could be considered; (iv) the petition was an abuse of process since it claimed an amount which was false; (v) the respondent was D solvent and had the ability to pay any amount claimed provided the claim was lawful and that the accounts of the respondent showed that the respondent had made a profit; and (vi) the petitioner in filing the petition acted in bad faith and was motivated by improper and indirect consideration.

E

Held (allowing the petition):

(1) The fact that the petitioner knew that the respondent was at all material times strenuously disputing the judgment obtained on 17 February 2006 and the statutory demands of the F petitioner and its refusal to pay the sum stated in the s. 218 notice did not bar the petitioner from filing the petition. The filing of the petition in the face of the respondent's refusal to pay the principal sum was not an abuse of process. (para 5.1.1)

G

(2) The judgment obtained by the petitioner was a final judgment with the respondent having exhausted all avenues of appeal. The enforcement of the judgment by the petitioner was not subject to the appeal filed by Visage in the Court of Appeal. H (para 5.1.2)

(3) Although the petitioner's interpretation of the judgment dated 17 February 2006 and the calculation of interest may be erroneous, this did not necessarily render the whole of the I interest sum claimed in the s. 218 notice and in the petition false. The respondent had not at any time stated what according to its calculation was the correct amount of interest

due and payable to the petitioner. So long as the petitioner's claim exceeded the sum of RM500 the petitioner was entitled to present the petition; *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* (refd); *Re Tweeds Garages Ltd* (refd). (para 6.1)

(4) Not every claim filed by a respondent after a petition has been filed will amount to a cross-claim which will afford the respondent good grounds to strike out or to stay the petition. The respondent's cross-claim must be a claim which arises out of or in some way connected to the petitioner's claim. The respondent's cross-claim was not a genuine and/or serious claim as there was little or no evidence to support the claim for damages for malicious prosecution. No explanation for the delay in the filing of the purported cross-claim was given. The purported cross-claim was made *mala fide* and filed for the purpose of delaying the disposal of the petition. (paras 7.1 & 7.2)

(5) The petitioner obtained a valid and final judgment against the respondent on 17 February 2006. The respondent could not go behind the judgment especially when the judgment had been affirmed by the Court of Appeal and the Federal Court. The respondent could not now challenge the validity of the judgment in a winding-up court. (para 7.3)

(6) The petition was not filed for a collateral purpose to exert pressure on the respondent. (para 7.6)

(7) While the presumption under s. 218 of the Act may be rebutted with proof that the respondent is indeed in a position to pay settle its debts, the respondent had merely attempted to show it was solvent by producing the statement of accounts. There was insufficient evidence to prove that the respondent was solvent. (para 8.6)

Case(s) referred to:

Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd [2010] 8 CLJ 775 CA ***(refd)***

In re London and Paris Banking Corporation [1874] LR 444 ***(refd)***

Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd [2000] 4 CLJ 437 FC ***(refd)***

Mann and Anor v. Goldstein and Anor [1968] 1 WLR 1091 ***(refd)***

Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317 SC ***(refd)***

A *Pontian United Theatre Sdn Bhd v. Southern Finance Berhad [2006] 1 CLJ 1067 CA* ***(refd)***

Quartz Hill Consolidated Gold Mining Company and Eyre [1883] 11 QBD ***(refd)***

Re Tweeds Garages Ltd [1962] 1 All ER 121 ***(refd)***

B *Siti Esah Talib v. Mentiga Corporation Bhd [2010] 5 CLJ 712 HC* ***(refd)***

Taib Awang v. Mohamad Abdullah & Ors [1984] 1 CLJ 44; [1984] 2 CLJ (Rep) 501 HC ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 218(1)(e), (2)(a), 236(2)

C *For the petitioner - Claudia Cheah (Shanon Rajan with her); M/s Skrine & Co*

For the respondent - SP Chanra; M/s HN Lim & Co

Reported by Amutha Suppayah

D

JUDGMENT

Mah Weng Kwai JC:

E

[1] Brief Facts

1.1. On 17 February 2006 the petitioner obtained a judgment against the respondent and three others in Kuala Lumpur High Court Civil Suit No: D8-22-1313-2004 for the principal sum of RM1,538,239.26 together with interests and costs. As the respondent failed and/or refused to pay the judgment sum despite requests and demands made by the petitioner, the petitioner on 5 February 2010 served a notice pursuant to s. 218(2)(a) of the Companies Act 1965 (the Act) on the respondent at its registered address.

F

G

1.2. In the s. 218 notice, the petitioner demanded for payment of the principal sum of RM1,538,239.26 together with interests calculated up to 4 February 2010, less two payments received, thereby totalling RM2,826,207.06. As the respondent did not pay the said sum of RM2,826,207.06 or any part thereof within the stipulated 21 days, the respondent was deemed *prima facie* insolvent and unable to pay its debt.

H

I

1.3. On 10 March 2010 the petitioner filed the winding-up petition to wind-up the respondent pursuant to the s. 218 notice.

1.4. Prior to the filing of the present petition, the petitioner had on 10 March 2006 filed a winding-up petition against the respondent in respect of the sum of RM2,122,088.39 being the principal and interests due and owing. This first petition was struck off on 28 July 2007. On 31 October 2007 the petitioner filed a second petition to wind-up the respondent in respect of the sum of RM2,699,033.47 being the principal and interests due and owing. This second petition was dismissed on 17 September 2008.

1.5. As a result of the two previous winding-up petitions filed by the petitioner, the first of which was struck off and the second dismissed by the court, the respondent filed a claim on 3 May 2010 against the petitioner *vide* Kuala Lumpur High Court Civil Case No: S22-391-2010 for damages not exceeding RM5 million for malicious prosecution and abuse of process. The respondent contended that the claim was a genuine cross-claim against the plaintiff's winding-up petition.

1.6. The plaintiff's judgment obtained against the respondent was based on a corporate guarantee given by the respondent in respect of a contract undertaken by Visage Engineering Sdn Bhd (Visage). The petitioner had commenced arbitration proceedings and had obtained an award against Visage. Visage applied to set aside the award in the High Court but was unsuccessful, following which Visage appealed to the Court of Appeal. The appeal is pending.

[2] The Petitioner's Case

2.1. Counsel for the petitioner submitted *inter alia*:

2.1.1. That the petitioner had obtained a summary judgment on 17 February 2006 before the Senior Assistant Registrar. Being dissatisfied with the judgment, the respondent appealed to the judge in chambers who dismissed the appeal. The respondent then appealed to the Court of Appeal which also dismissed the appeal. The respondent applied for leave to appeal to the

A Federal Court but the leave application was refused. Hence, the judgment obtained by the petitioner is a final judgment.

2.1.2. That Visage is not a party to the winding-up
B proceedings and that the Petition is not dependent on the outcome of Visage's appeal in the Court of Appeal.

2.1.3. That the respondent's dispute on the judgment debt is not *bona fide*.

C 2.1.4. That the purported cross claim filed by the respondent for malicious prosecution is to delay the winding-up proceedings.

2.1.5. That the respondent is insolvent and unable to pay the
D judgment debt.

[3] The Respondent's Case

3.1. Counsel for the respondent submitted *inter alia*:

E 3.1.1. That the petitioner well knew before the filing of this petition that the respondent had strenuously opposed the first and second winding-up petitions and that by filing this petition in the face of such objection this amounted to an abuse of process.

F

3.1.2. That the respondent had by its solicitor's letter dated 25 February 2010 (encl. 9 – exh. A4) given notice of objection on the validity of the s. 218 notice in that it was issued for an unlawful sum and/or for an excessive amount which sum is disputed by the respondent and
G gave notice that it would commence legal proceedings for malicious prosecution should the petitioner proceed to file its (the third) winding-up petition.

3.1.3. That the respondent had a valid cross-claim for a sum
H not exceeding RM5 million against the petitioner as damages for malicious prosecution and abuse of process. And as the cross-claim is a genuine cross-claim it ought to be heard and determined by the court before the winding-up petition can be considered.

I

3.1.4. That the petition is unsustainable and is an abuse of process as in para. 5 of the petition the petitioner is claiming the sum of RM2,826,207.26 which was false and was an untruthful averment of the amount due. Counsel for the respondent contended that the judgment obtained by the petitioner on 17 February 2006 only allowed the petitioner to claim the interest sum of "jumlah RM583,499.13 sahaja sebagai faedah yang genap masa dan harus dibayar kepada plaintif dikira pada kadar 10% setahun, kiraan pada kaedah harian bermula dari tarikh wang tersebut genap masa 31 May 2004" that is, as at 31 May 2004 and not the interest sum beyond 31 May 2004 calculated up to 4 February 2010. As the judgment did not provide for interest to be calculated after 31 May 2004 up to the date of full payment, the respondent contended that the claim was unlawful, false, fraudulent, untrue and/or invalid. And as the affidavit verifying petition confirmed the amount claimed in the petition which amount was said to be false, there was therefore no valid affidavit verifying the petition.

3.1.5. That the respondent is solvent and has the ability to pay any amount claimed provided the claim was lawful and that the accounts of the respondent for Financial Year Ending 2008 showed that the respondent had made a profit.

3.1.6. That the petitioner in filing this petition was acting in bad faith and was motivated by improper and indirect consideration.

[4] Decision Of The Court

4.1. Upon considering the winding-up petition, the affidavits filed by the petitioner and respondent and the written submissions of counsel for the petitioner and upon hearing the oral submissions of both counsel, the court allowed the petition.

A **[5] Reasons For The Decision**

5.1. No bar to filing of the present petition

5.1.1. The fact that the petitioner well knew that the respondent was at all material times strenuously disputing the judgment obtained on 17 February 2006 and the statutory demands of the petitioner and its refusal to pay the sum stated in the s. 218 notice or any part thereof, does not bar the petitioner from filing this petition. The petitioner has every right to commence winding-up proceedings against the respondent to recover the judgment sum, much as the respondent has every right to challenge the debt claimed. The filing of the petition in the face of the respondent's refusal to pay the principal sum together with interest does not amount to an abuse of process by the petitioner. Section 218(1)(e) of the Act provides for a company to wound-up if the company is unable to pay its debt. Section 218(2)(a) of the Act defines the meaning of the words "inability to pay". Accordingly, after a lapse of 21 days and the respondent has failed, neglected or omitted to satisfy the petitioner's claim, the presumption of insolvency arises against the respondent and the onus is on the respondent to rebut that presumption.

5.1.2. The judgment obtained by the petitioner is a final judgment with the respondent having exhausted all avenues of appeal. The enforcement of the judgment by the petitioner is not subject to the appeal filed by Visage in the Court of Appeal against the decision of the High Court dismissing its application to set aside the arbitration award. Visage is not a party in this case and the proceedings by the petitioner against the respondent and Visage respectively are separate and distinct proceedings. It will be wrong for counsel for the respondent to maintain that the petitioner should not proceed with the winding-up proceedings until the appeal by Visage has been disposed off. I disagree with the counsel for the respondent that the judgment obtained by the petitioner is not enforceable on the

ground that there is a substantial dispute to the petition as the continuing challenge on the construction agreement by Visage is still pending in the Court of Appeal.

According to the case of *Morgan Guaranty Trust Co New York v. Lian Seng Properties Sdn Bhd* [1991] 1 CLJ 260; [1991] 1 CLJ (Rep) 317, *prima facie* a creditor, like the petitioner here, who has not been paid has the right to file a petition for winding-up whatever its other motives may be.

[6] No False Claim

6.1. The petitioner in the s. 218 notice dated 4 February 2010 had claimed for the sum of RM2,826,207.26 which included the sum of RM1,507,707 (without deduction of payments received) being interest calculated up to 4 February 2010, according to its interpretation and computation of the judgment sum granted by the court. The respondent claimed that the calculation of interest was wholly wrong and therefore false. The respondent contended that the petitioner could not claim any interest after 31 May 2004 as it was not provided for in the judgment and that the sum claimed is a "misrepresentation of an exceptional nature that cannot be justified". I am of the view that although the petitioner's reading and interpretation of the judgment dated 17 February 2006 and the calculation of interest up to 4 February 2010 may be wrong or erroneous but this does not necessarily render the whole of the interest sum claimed in the s. 218 notice and in the petition false. The respondent's contention that the petitioner's claim is fraudulent is overstating or overdramatizing the issue. The claim of falsity and fraud alleged by the respondent necessarily implies that the petitioner had a dishonest intention in arriving at the interest sum claimed as it did, to mislead and to misrepresent to the court. The allegation of a false or fraudulent claim by the respondent remained a bare allegation without any supporting evidence adduced in the affidavits to show proof of the dishonest intention of the petitioner. It is important to note that while the

respondent contends that the calculation of interest by the petitioner is false, the respondent has not at any time stated what according to its calculation is the correct amount of interest due and payable to the petitioner. If the respondent says that they are not indebted to the petitioner, the respondent has to provide an explanation as to why they are not so indebted in the sum claimed by the petitioner. It is not enough for the respondent to merely deny their indebtedness or to aver that the petitioner's claim is false.

6.2. The petitioner submitted that so long as their claim was for a sum exceeding RM500 they were entitled to file the winding-up petition notwithstanding that there may be a dispute by the respondent as to the exact amount due and payable. In the case of *Malaysia Air Charter Company Sdn Bhd v. Petronas Dagangan Sdn Bhd* [2000] 4 CLJ 437, the Federal Court held that the s. 218(2)(a) notice should be liberally interpreted. A notice of demand under the sub-section need not specify the exact sum due as at the date of the demand. So long as the sum due exceeds RM500 and remained unpaid after a demand made without any reasonable explanation to the satisfaction of the court, there is neglect to pay such sum within the meaning of the section. In this case the court considered the calculation of the sum claimed by the petitioner as set out in the petition in encl. 1 exh. A3 sufficient.

6.3. Following the decision of the Federal Court, I am of the view that so long as the petitioner's claim exceeds the sum of RM500 the petitioner is entitled to present this petition. And in the case of *Re Tweeds Garages Ltd* [1962] 1 All ER 121 it was held that where there was no doubt that petitioners were creditors for a sum which would otherwise entitle them to a winding-up order, a dispute as to the precise amount owed was not a sufficient answer to the petition and accordingly a winding-up order would be made.

[7] Whether The Petition Ought To Be Stayed/Struck Off In View Of The Cross-Claim

7.1. The respondent contended that by filing its cross-claim for damages for malicious prosecution against the plaintiff on 3 May 2010 in Kuala Lumpur High Court Civil Case No:

S22-391-2010 it had established the fact that a valid and justifiable cross-claim has been made against the petitioner and that accordingly the petition should be struck out or stayed. To begin with, I am of the view that not every claim filed by a respondent after a petition has been filed will amount to a cross-claim which will afford the respondent good grounds to strike out or to stay the petition. The respondent's cross-claim must be a claim which arises out of or in some way connected to the petitioner's claim.

7.2. In the present case, the petitioner's claim against the respondent arose out of a corporate guarantee given in favour of Visage in respect of a building contract entered into between the petitioner and Visage sometime in 1999. The contract was in respect of the design, construction and completion of the development of a new office complex for Dewan Bahasa dan Pustaka whereas the claim filed by the respondent arises out of the filing of the previous two winding-up petitions by the petitioner which were struck off and dismissed by the court respectively. I am of the view that the claim filed by the respondent now called a cross-claim by the respondent is not a genuine and/or serious claim as there is little or no evidence adduced on affidavit by the respondent to support its cross-claim for damages for malicious prosecution. The petition was filed on 10 March 2010 whereas the purported cross-claim was filed on 3 May 2010. No explanation for the delay in the filing of the purported cross-claim has been given. The s. 218 notice was issued by solicitors for the petitioner on 4 February 2010. Solicitors for the respondent responded by letter dated 25 February 2010 but no mention of any intended cross-claim was stated in the letter. The court can only conclude in the circumstances that the purported cross-claim was made *mala fide* and filed for the purpose of delaying the disposal of the petition.

7.3. I am further of the view that the respondent besides merely stating that the respondent had filed a suit on 3 May 2010 for damages for malicious prosecution in para. 4(iii) of the affidavit in support by the respondent (encl. 12), the respondent has failed to set out in its affidavits (encls. 12 and 17) the facts on which the

purported cross-claim is based with the necessary details so that the petitioner can have a fair opportunity to state its case on affidavit. It cannot be denied that the petitioner had obtained a valid judgment against the respondent and has the right to file a petition. The previous winding-up petitions were dismissed on technical grounds on 28 July 2007 and 17 September 2008 respectively. Importantly, it will be noted that the previous petitions were not considered on their merits and that there is no impropriety in the petitioner filing the petition for the third time. Following on the order of a winding-up, the respondent can in any event, still continue to pursue its purported cross-claim by its liquidator (see s. 236(2) CA).

7.4. In the Court of Appeal case of *Pontian United Theatre Sdn Bhd v. Southern Finance Berhad* [2006] 1 CLJ 1067 Zulkefli Makinudin JCA (now FCA) held that the mere fact of a cross-claim or a counter cross-claim is never of itself a bar to the making of a winding-up order on a petition by a petitioning creditor. The learned judge went on to state that it is not sufficient for a company facing a winding-up petition to merely aver by affidavit the existence of a meritorious counter claim. The company must set out by way of affidavit evidence the facts on which the counter-claim is based, giving the necessary details so that the petitioner will have a fair opportunity to present its side of the story by affidavit, and the court, by considering the affidavits of the petitioner and the company will be able to assess, without actually deciding it, whether the claim has weight or raises a serious issue. At p. 1083 the learned Justice Zulkefli Makinudin made the following observations:

> The appellant alleged that it had a counterclaim against the respondent for RM4.8 million, larger than the amount underlying the winding-up petition. Following from there it is the contention of the appellant based on decided cases a winding-up petition would be dismissed or stood over whenever there is the existence of a counterclaim or cross claim which equalled or exceeded the debt on which the petition was based. On this contention of the appellant I need to place words of caution here in that if it be right that the making of a cross claim or counterclaim by a company against a petitioning creditor is enough to stay the petition, there would be widespread abuse

and judgment creditors would be deprived of the rights which the law gives them. It is for this reason that it has been held in case laws that the mere fact of the cross claim or a counterclaim is never of itself a bar to the making of a winding-up order on a Petition by a petitioning creditor. (See the case of *In re Douglas Griggs Engineering Ltd* [1963] Ch. 19.23).

It is true the modern practice is that where a company had a genuine and serious cross claim or counterclaim against the petitioning creditor which it had not reasonably been able to litigate, the petition should usually be dismissed or stayed. (See the case of *In re L.H.F. Wools Ltd* [1970] 1 Ch. 27). However, on this point my learned brother Abdul Aziz Mohamed JCA in his judgment had rightly and clearly amplified the position by stating that it is not sufficient for a company facing a winding-up petition to merely aver by affidavit the existence of a meritorious counterclaim. The company must set out by way of affidavit evidence the facts on which the counterclaim is based, giving the necessary details so that the Petitioner will have a fair opportunity to present its side to the story by affidavit and the court, by considering the affidavits will be able to assess, without actually deciding it, whether the claim has weight or raises a serious issue. I agree with his lordship that the appellant in the present case have not done that. Accordingly, I would dismiss the appeal.

7.5. In his submission, counsel for the respondent had relied on the case of *Mann and Anor v. Goldstein and Anor* [1968] 1 WLR 1091 where it was held "that a creditor's winding-up petition could only be presented by a creditor and since the debts upon which both the defendants founded their petition will be substantially disputed, neither of the petitioners were established as "creditors" of either of the two companies: and that, accordingly, neither was entitled to present a petition as neither has any *locus standi* in the Companies Court." However, I am of the view that the case of *Mann v. Goldstein* can be easily distinguished from the present case in that the petitioner herein had filed the petition pursuant to the judgment dated 17 February 2006 and thus has *locus standi* to file the petition.

7.6. The court was mindful of the test laid down in the case of *Quartz Hill Consolidated Gold Mining Company and Eyre* [1883] 11 QBD p. 674 on whether the petition was presented falsely and maliciously without reasonable and probable cause calculated to injure the respondent or whether the petitioner had a genuine claim for a proven debt against the respondent. The court is of the view that the purported cross-claim has little or no reasonable prospects of success. The court further holds that the plaintiff has a genuine claim for a judgment debt and in any event the petition was not presented falsely and maliciously calculated to injure or exert undue pressure on the respondent.

[8] Whether The Petition Ought To Be Stayed/Struck Off In View Of The Claim By Visage

8.1. The court is of the view that as the petitioner had obtained a valid and final judgment against the respondent on 17 February 2006, the respondent cannot go behind the said judgment especially when the judgment has been affirmed by the Court of Appeal and the Federal Court. The respondent cannot now challenge the validity of the judgment in a winding-up court and further it will be noted that there has been no stay of execution of the said judgment. On the issue of whether a respondent can challenge the validity of a court order in the winding-up proceedings, Abdul Malik Ishak JCA in the Court of Appeal case of *Gulf Business Construction (M) Sdn Bhd v. Israq Holding Sdn Bhd* [2010] 8 CLJ 775 at 785 held:

> It is legally impossible for the respondent to challenge the validity of the court order dated 3 June 2005 in the winding-up proceedings. If high authority is required for this simple proposition, the case of *Sovereign General Insurance Sdn. Bhd. v. Koh Tian Bee* [1988] 1 CLJ 155; ([1988] 1 CLJ (Rep) 277), SC, a decision of Lee Hun Hoe CJ (Borneo) should be referred to. There at p. 157 (p. 279), his Lordship had this to say:
>
> > In the exercise of his jurisdiction in bankruptcy proceedings, the learned judge cannot go behind the judgment. Thus on an application to set aside a bankruptcy notice, it was laid down as early as

> 1893 that the court could not go behind the judgment. See *In re Easton* [1893] 10 Mor. 111; 9 TLR 409. Even if there has been an irregularity in the service of the notice of sale, it is not open to the respondent in this case to challenge the execution proceedings.

In the same vein, Steve Shim J (later Chief Judge, Sabah & Sarawak) in *Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff bin Haji Hussain)* [2000] 1 LNS 197; [2000] 6 MLJ 155, had this to say at p. 158 of the report:

> In this trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc.

8.2. The court cannot take into account that as the claim by Visage against the petitioner is still pending hearing in the Court of Appeal the petition ought to be stayed or struck off as contended by counsel for the respondent. In any event the court has taken into consideration the following salient points:

a) Visage is not a party to the judgment obtained by the petitioner against the respondent or to the winding-up petition.

b) Visage is a principal debtor of the petitioner and Visage is challenging the Arbitration Award of 6 February 2006.

c) Visage's application to set aside the Award was dismissed by the High Court on 27 July 2009.

d) The petitioner's application to enforce the award was allowed by the High Court on 5 March 2010.

8.3. There is no reason for the court to either strike out or stay the petition merely because Visage still disputes the claim made by the petitioner against it and the resulting Arbitration Award.

8.4. The claim by the respondent for general damages for malicious prosecution of a sum of not less than RM5 million is an arbitrary figure plucked by the respondent. The court agrees with the contention by counsel for the petitioner that as this winding-up petition had not been heard as at 3 May 2010, the date of filing of the purported cross-claim, the cross-claim is premature. As the previous two petitions were not litigated they cannot be said to be terminated in favour of the respondent and as such the respondent lacks the locus to file the purported cross-claim. In the case of *Taib Awang v. Mohamad Abdullah & Ors* [1984] 1 CLJ 44; [1984] 2 CLJ (Rep) 501, it was held that in an action for malicious prosecution it is essential for the plaintiff to aver and prove that the proceedings complained of terminated in his favour. In his oral submission, counsel for the respondent cited the case of *In re London and Paris Banking Corporation* [1874] LR 444 in support of his argument that the petitioner had filed the petition to exert pressure on the respondent to pay their claim. However this case can be quite easily distinguished from the present case as the petitioner in *In re London and Paris Banking Corporation* did not obtain a valid judgment and the debt was disputed.

8.5. Counsel for the respondent also referred to the case of *Siti Esah Talib v. Mentiga Corporation Bhd* [2010] 5 CLJ 712 to support his contention that the petitioner had filed the petition to "harass and embarrass the respondent". However for reasons already stated, the court is of the view that in this case the petition was not filed for a collateral purpose to exert pressure on the respondent.

8.6. The respondent claims that it is solvent and has the means to pay any amount provided the claim is lawful. I am of the view that while the presumption under s. 218 of the Act may be rebutted with proof that the respondent is indeed in a position to pay or to settle its debt, the respondent in the present case had merely attempted to show it is solvent by producing the statement of accounts for the Financial Year Ending 2008. The court is of the view that there is insufficient evidence to prove that the respondent is solvent. Of course, payment of the principal

and interest sums not in dispute into an agreed stakeholder's account or into court will go a long way to show that the respondent is indeed solvent.

On the test to ascertain commercial insolvency Abdul Malik Ishak JCA in the case of *Gulf Business Construction (M) Sdn Bhd (supra)* had the occasion to say:

> The test to ascertain commercial insolvency is rather simple. It is this. That the company is unable to meet the current debts as they fall due. And such a company may still be categorized as "unable to pay its debts" even though the company has substantial wealth which cannot be realized immediately and even though on liquidation the company will be able to meet all its liabilities (*Re Sunshine Securities (Pte) Ltd., Sunshine Securities (Pte) Ltd. & Anor. v. Official Receiver And Liquidator of Mosbert Acceptance Ltd.* [1977] 1 LNS 109, CA; *Wei Giap Construction Co. (Pte.) Ltd. v. Intraco Ltd* [1978] 1 LNS 235; *Malayan Plant (Pte.) Ltd. v. Moscow Narodny Bank Ltd.* [1980] 1 LNS 44, PC; *Hotel Royal Ltd Bhd v. Tina Travel & Agencies Sdn Bhd* [1989] 1 LNS 170; *MBF Finance Bhd v. Sri-Hartamas Dvpt. Sdn. Bhd.* [1992] 1 CLJ 160; [1992] 3 CLJ (Rep) 55, at p. 59; *Lian Keow Sdn. Bhd. (In Liquidation) & Anor. v. Overseas Credit Finance (M) Sdn. Bhd. & Ors.* [1988] 1 LNS 44; [1988] 2 MLJ 449 at p. 454, SC; *PT Anekapangan Dwitama v. Far East Food Industries Sdn Bhd* [1998] 4 CLJ Supp 437; and *Pioneer Concrete (M) Sdn. Bhd. v. Celini Corporation Sdn Bhd* [1999] 5 CLJ 145).

For the above reasons, the winding-up petition was allowed.